IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4032 OF 1994

1.Baba Hari Mohite & Ors.
2.Smt.Banubai Hariba Mohite
(Since deceased) her heirs
2A. Baba Hari Mohite,
2B. Namdeo Hari Mohite,
2C. Baban Ramchandra Sapkal

3.Namdeo Hari Mohite.
4.Baba Ganpat Mohite. ... Petitioners
5.Gangubai Shrirang Mohite. (Orig.Plffs.)

Verses

1.Dinkar Ramchandra Sapkal and ors.
2.Hanumant Ramchandra Sapkal.
3.Namdeo Ramchandra Sapkal.
4.Baban Ramchandra Sapkal.
5.Smt.Laxmibai @ Manuka Ramchandra
Sapkal (Since deceased).
6.Shri Yashwant Mahadeo Mohite
(Since deased) his heirs
6A.Smt.Tarubai Yashwant Mohite
6B. Shri Anandrao Yashwant Mohite.

7.Waman Mahadeo Mohite.
8.Smt.Kusum Dadasaheb Wagh.
9.Smt. Parvati Kisan Shedage.
10.Smt.Chatura Sadashiv Shedage,
(Since deceased) her heirs
10A. Sou.Rukmini Shahaji Gunjawat
10B. Shri Kundlik Yashwant Shedage
10C. Shri Abaji Yashwant Shedage
10D. Shri Sambhaji Yashwant Shedage .. Respondents
10E. Sou.Tai Dhanaji Mulik (Orig.Defts.)

Mr Dilip Bodke, for the petitioners.
Mr Vivek Salunkhe i/b Mr P.B.Shah, for the respondents.

CORAM : D.B.BHOSALE,J.
DATE : 29.09.2006

ORAL JUDGMENT:

1. By this writ petition under Article 227 of the Constitution of India, the petitioners have taken exception to the order dated 10.8.1994, by which an application at Exhibit-86 filed by respondent no.1 under Order 22, Rule 3(1) and (2) of the Code of Civil Procedure (for short, "the CPC"), seeking dismissal of Regular Civil Suit No.278 of 1981 as abated in its entirety, has been allowed. The petitioners are the original plaintiff nos 1 to 4 and 6, whereas the respondents are the original defendants, hereinafter referred to as "the petitioners" and "the respondents" respectively. Insofar as the original plaintiff no.5 Banubai Hariba Mohite is concerned, she would be referred to by her name.

2. The petitioners and Banubai Mohite instituted Regular Civil Suit no.278 of 1981 for declaration, injunction and also for mandatory injunction seeking directions to the respondents to remove the obstruction in enjoyment of their right of way and use of the door, as shown in the map annexed to the plaint. They have claimed an easement of necessity against the respondents. The suit was filed on 19.8.1981 claiming the aforestated reliefs against all the respondents. During pendency of the suit, Banubai Mohite died on 30.12.1991. It appears that no immediate steps were

taken by the petitioners for bringing her heirs and legal representatives on record. However, an application seeking to bring her legal representatives on record was filed on 6.1.1993 and it was rejected on the very same day. The order rejecting that application was challenged in writ petition no.1207 of 1993 and the writ petition was dismissed vide order dated 23.6.1993. Thereafter, respondent no.1 filed the application at Exhibit-86 under Order 22, Rule 3(1)(2) of CPC for dismissal of the suit in its entirety as abated, which came to be allowed by the impugned order.

3. It is against this backdrop the question that falls for my consideration is "whether the order, dismissing the suit in its entirety as abated, in the facts and circumstances of the present case, is sustainable in law and whether the petitioners are entitled to proceed with the suit against the respondents-defendants. In other words, looking to the reliefs claimed in the suit, whether after the death of Babubai Mohite - plaintiff no.5, the right of the petitioners - plaintiffs no. 1 to 4 and 6, survives even if her legal representatives are not brought on record and in their absence whether the suit can proceed against the respondents-defendants.

4. Mr Bodke, learned counsel for the petitioners, at the outset, invited my attention to the provisions of Order 22, Rule 2 and submitted that looking to the nature of the reliefs in the suit the right to sue of the petitioners would survive even after the death of Banubai Mohite and they have every right to proceed with the suit further. He submitted that though the common suit was filed by all the five petitioners and Banubai Mohite, every one of them has an independent/separate right to claim the reliefs prayed for in the suit instituted by them. In other words, he submitted that though this is a case of common interest, it cannot be said that the rights of the parties are joint or indivisible. On the other hand, Mr Salunkhe, learned counsel for the respondents, submitted that all the petitioners, being co-owners of the property in respect of which they sought the reliefs in the suit, it cannot be said that their rights and interest are separate. He further submitted that dismissal of the suit as abated against Banubai Mohite is also a decree and, therefore, if the petitioners are allowed to proceed with their suit and if the suit is decreed, there would be inconsistent decrees, which is not permissible in law. In support of his contentions, he placed reliance upon the following judgments of this court : **Annabai Devram Kini & Ors Vs. Mithilal Daisangar Singh and ors, 2002**

(8) LJ SOFT 56 and Mahendra C Shah and ors Vs. Shrimati P Shah and Ors, 1998 (4) LJ 576. He also placed reliance upon the judgment of the Apex Court in **Ramagya Prasad Gupta and others Vs. Murli Prasad and others, AIR 1972 Supreme Court 1181.** The learned Judges of this Court in both the aforesaid judgments have referred to and relied upon the judgment of the Supreme Court in **R.P.Gupta's case** (supra).

5. The provisions contained in Rule 2 of Order 22 of CPC deal with the procedure where one of several plaintiffs or defendants dies and right to sue survives. It provides that where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants. In short, this provision provides that where there are more than one plaintiffs and on the death of one of the plaintiffs if the cause of action/right to sue survives the suit does not abate and the surviving plaintiffs can proceed with the suit further against the defendants, irrespective of the fact

whether an application for bringing heirs of the deceased plaintiff was filed or not or it was filed and rejected. The survival of cause of action or right to sue is the test. if the cause of action survives against the surviving party after the death of one of the parties, the suit does not abate.

6. Before I consider the judgments relied upon by the learned counsel in support of their contentions, I would like to consider the proposition advanced by the learned counsel for the respondent that dismissal of the suit as abated is also a decree and, therefore, if the suit proceeds and is allowed, there would be inconsistent decrees. It would be advantageous to see the definition of "decree" as specified by Sub-section (2) of Section 2 of CPC, which reads thus :

> "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final"

A bare perusal of the definition of "decree" shows that the order dismissing a suit or dismissal of a suit as abated is not a decree since there is no formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

7. Order 22, Rule 9 of CPC read with Order 22, Rule 4 of CPC makes it obligatory to seek substitution of the heirs and legal representatives of the deceased plaintiff if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no such substitution is sought, the proceedings abate. Sub rule (2) of Rule 9 of Order 22 enables the party, who is under an obligation to seek substitution, to apply for an order to set aside the abatement and if it is proved that he

was prevented by any sufficient cause from continuing the suit which would include an appeal, the court shall set aside the abatement. The Supreme Court in Madan Naik and ors Vs. Smt.Hansubala Devi and ors, (1983) 3 SCC 15 had an occasion to deal with all the aforesaid provisions as also the provisions of section 2, sub-section (2) of CPC and in paragraph 8 thereof held thus:

> "8. ... ... When an appeal abates for want of substitution as envisaged by sub rule (1) of Rule 9 of Order 22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Section 11 of CPC would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22, Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22, Rule 9(2), CPC refusing to set aside abatement is specifically appealable under Order 43, Rule 1(k). Such an adjucation if it can be so styled would not be a decree as defined in Section 2(2), CPC. Section 100 provides for second appeal to the High Court from every decree passed in appeal by any court subordinate to the High Court on the grounds therein set out. What is worthy of notice is that a second appeal lies against a decree passed in appeal. An order under Order 22, Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent."

It is thus clear that the abatement of proceedings takes place in its own force by passage of time. No specific order for abatement is envisaged under Order 22. It is

only for setting aside the abatement that a specific order is necessary under Order 22 Rule 9. An order refusing to set aside abatement is specifically appealable as an order under Order 43, Rule 1(k). It is thus clear that the order recording dismissal of the suit as abated or its dismissal in its own force by passage of time is no decree as specified by Section 2(2) of CPC inasmuch as it does not imply formal expression of an adjudication on merits. It is against this backdrop I would now like to examine whether the Judgments relied upon by the respondents would apply in the instant case.

8. The Supreme Court in **R.P.Gupta's** case was dealing with the case of one Parasnath Parasad. He had filed a suit for dissolution of partnership and rendition of accounts. To that suit the remaining nine partners or their heirs were made parties. Parasnath claimed that in his own right under the partnership agreement he was entitled to one anna share and that out of his share of one anna, a three pies share had been sold in a public auction and it was purchased by one Thakur Prasad. Thakur Prasad was, therefore, made a party to the suit as defendant no.10. In the suit, a preliminary decree was passed on February 10, 1959 in which the respective shares of various partners or their heirs were declared and an account was ordered. The plaintiff Parasnath was

declared to be the owner of a six pies share out of the one anna share claimed by Parasnath. Thakur Prasad's claim to the three pies share was negatived. From the judgment of the trial Court Thakur Prasad and two others filed separate appeals and during pendency of the appeals two respondents died. Their heirs were not brought on record and, therefore, it was a case of one of the respondents that the appeals have abated as a whole or are otherwise, incompetent. It is against this backdrop the Supreme Court in paragraph 16 of the judgment observed thus :

> "16. Under Rule 4 (3) read with rule 11 of Order 22 CPC the appeal abates as against the deceased respondent where within the time limited by law no application is made to bring the heirs or legal representatives on record. As pointed out by this Court in State of Punjab Vs Nathuram (1962) 2 SCR 636 it is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is so not because of the procedural defects but because as Mulla has pointed out it is part of the substantive law. (See Mulla C.PC. Vol 1 Thirteenth Edition P 620 under note Non-joinder of parties). No exhaustive statement can be made as to the circumstances under which an appeal in such cases cannot proceed. But the courts, as pointed out in the above decision, have applied one or the other of three tests. **The courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between**

> **the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent;** (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests, as pointed out by this Court in Sri Chand Vs M/s Jagdish Pershad Kishan Chand, (1966) 3 SCR 451 = (AIR 1956 SC 1427) are not cumulative tests. Even if one of them is satisfied , the court may dismiss the appeal."
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> (emphasis supplied)

This judgment was relied upon by the learned Single Judge in **Mahendra C. Shah**'s case. In that case also the suit was filed for dissolution of the partnership and rendition of accounts and during pendency of trial, one of the plaintiffs had died and for eight years no application for bringing his heirs and legal representatives on record was filed. In the meanwhile, one of the defendants also died. The Chamber Summons was taken out for bringing on record the legal representatives of deceased plaintiff and defendant. The said Chamber summons was dismissed. Upon dismissal of the Chamber summons by way of consequential order the court dismissed the suit having abated. The Notice of

Motion taken out for setting aside the said order of dismissal. Looking to the similar facts and the nature of reliefs in the suit, it appears that the Notice of Motion was dismissed by the Learned Single Judge relying upon the Judgment of the Supreme Court in R.P.Gupta's case. It is clear from the facts of that case and R.P.Gupta's case that the suits were filed for dissolution of partnership and rendition of accounts.

9. The Supreme Court in **R.P.Gupta**'s case has laid down three tests taking into consideration the situation where if one of the parties to the proceedings dies during pendency of the appeal what would be the effect of it on the appeal. The Supreme Court states that the courts would not proceed with an appeal when the success of the appeal may lead to the Court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent. The Supreme Court further observed that when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and when the decree against the

surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. None of these tests could be applied to the facts of the present case for a simple reason the present case is still before the trial Court and so far there is no decree. In the present case, the rights of the parties to sue are independent and separate and in any case cannot be termed or treated as joint and indivisible. Right of easement or easement of necessity is an independent and separate right and every individual can claim it independent of others. Merely because one or few individuals, amongst several, have either not claimed such right or have claimed but their suit has been dismissed for default or as abated, does not mean that the other persons similarly placed would loose their right to file an independent suit or to proceed with their suit claiming such right. It is quite possible and permissible that a person against whom such right is claimed and has succeeded in the proceedings before the Court on merits, may rely upon the judgment in a suit brought by any other persons similarly placed and seek dismissal of such suit. The judgment in earlier suit may help to persuade the court to dismiss the subsequent suit filed by others. However, the right of such other persons cannot be taken away to file a suit. They may loose on merits in view

of the judgment passed in the suit of other similarly placed persons. It would be a matter of appreciation and will depend upon the facts of each case. In the instant case, it cannot be said that the decree sought by the plaintiffs was joint, inseparable or indivisible. Right of easement of every plaintiff in the present suit, though claimed by filing common suit, is separate. However, keeping in view the first test laid down in **R.P.Gupta's** case, had the present suit been dismissed on merits and in appeal by all the plaintiffs, if one of the plaintiffs had died and the appeal was not dismissed as abated and the suit was decreed in appeal, there was a possibility of conflicting decrees. In the present case the suit was still in the trial court. And, since dismissal of the suit as abated is not a decree as specified by sub-section (2) of section 2 of CPC against Banubai Mohite, the question of conflicting decrees would not arise. In the circumstances, the aforesaid judgments relied upon by the learned counsel for the respondents are of no avail to the respondents. In the present case, right to sue would survive insofar as the petitioners are concerned and, therefore, they have every right to proceed with the suit further.

10. The judgments relied upon by the learned counsel for the respondents in **Annabai Devram Kini'**s case (supra)

also would not help the respondents. In that case, the question that was framed by the Division Bench while dealing with the appeals arising from the judgment of the learned Single Judge was "whether the suit for specific performance of the contract abates in its entirety when one of the plaintiffs **being party to a joint, indivisible contract,** dies and his heirs and legal representatives are not brought on record within the specified time and whether it is permissible for the heirs and legal representatives of such plaintiffs to apply after several years to bring themselves on record and **set aside the abatement of the suit only as against the deceased plaintiff.**" The question formulated by the Division Bench itself would indicate two distinguishing factors. Firstly, the plaintiffs in that suit were parties to a joint and indivisible contract and that the application for bringing the heirs and legal representatives of the deceased plaintiff and for setting aside the abatement of the suit only as against the deceased plaintiff was filed. It appears that during pendency of the suit, plaintiff no.1 died on 5.4.1997. Plaintiff nos 2 and 3 did not take any steps to bring the heirs and legal representatives of the deceased plaintiff on record. On 28.6.2000 a Chamber Summons was taken out by the heirs and legal representatives of the deceased plaintiff no.1 for

bringing them on record in place of plaintiff no.1 and/or setting aside the abatement of suit with regard to plaintiff no.1 only. The suit was filed for specific performance of the contract by three plaintiffs. The surviving plaintiff did not bring the heirs and legal representatives of the deceased plaintiff on record within the prescribed time. It is against this backdrop the suit had bated against all the three. However, the application was filed for bringing heirs and legal representatives on record of the deceased plaintiff and for setting aside the abatement as against plaintiff no.1 only. The Division Bench, after considering the judgment of the Apex Court in **R.P.Gupta's** case as also in the **State of Punjab V Nathu Ram, Air 1962 Supreme Court 89**, allowed the appeal holding that the whole suit abates. The Division Bench in this judgment, after considering the judgment of this court in **Sarojdevi and others Vs.Charushil and others, A.I.R. 1986 Bombay 315,** has observed that all those in whom the right to sue survives jointly become necessary parties to the suit. In the event the heirs and legal representatives of deceased plaintiff are not brought on record the suit would abate as a whole. Similar is the view taken by the learned Single Judge of this Court in **Pandurang Sadashiv Patil Vs. Pandurang Chimanji Patil, 1983 Mh.L.J.460** wherein it was observed that whether the suit

abates in its entirety or not always depends upon the nature of the suit and also the nature of the interest of the deceased in the subject matter. When the interest of the two defendants in the property promised to be sold was joint indivisible and undefined, on the death of one of them, the suit could not proceed either for specific performance or refund of earnest money in the absence of legal representatives of the deceased. In that case the two brothers who were joint owners had entered into an agreement with the plaintiff to sell their property. The suit was founded upon the said agreement whether for specific performance or for the alternative relief of refund of earnest money. The interest of the two brothers was joint and indivisible in the field in question, the extent of the share or interest of each being unknown. Therefore, the question were could the plaintiffs maintain the suit, initially, only against one of the joint owners for any one of the two reliefs? Can it be said that on the death of one of the two joint owners the right to sue survive against the surviving defendant alone? They were answered in negative. In the present case, it cannot be said that the interest of the petitioner and Banubai Mohite was indivisible or inseparable. Therefore, the observations made by the Division Bench in Annabai Devram Kini’s case strongly relied upon by the respondents, are of no

avail.

11. The provisions contained in Order 1 Rule 9 of CPC also may be noticed, which provides that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In other words, the Court can deal with the matter in controversy so far as regards rights and interests of the plaintiffs and the defendants other than the deceased plaintiff, it has to proceed with the suit and decide. It is only when it is not possible for the court to deal with such matters, that it will have to refuse to proceed further with the suit and therefore dismiss it. Applying this principle to the facts of the present case, in my opinion, the surviving plaintiffs can proceed with the suit and there is no difficulty for the court in deciding the suit even if the suit stands abated against the deceased plaintiff. Right and interest of every petitioner is an independent right which they can exercise independent of each other. This is not a case where the suit has already been decreed on merits and the decree is joint and indivisible and therefore the appeal abates and that the other respondents cannot proceed with and the appeal will have

to be dismissed as a result of abatement against the deceased respondent. It is thus clear that the question whether the court can deal with the suit and proceed therewith, if one of the parties to the suit dies will dependent on facts of each case. Considerations which weigh with the court in deciding this question would be whether the suits between the plaintiffs and the defendants other than the deceased can be said to be properly instituted or can be said to have all necessary parties for the decision of the controversy before the court. The interest of the petitioners and Banubai Mohite may be common, but it is not joint and indivisible. Every petitioner has a separate house. They are not joint owners, as observed by the court below. From a plain reading of the plaint, it is clear that they have separate houses. Merely because petitioner no. 1 and 2 are staying together, does not mean they all were joint and their rights and interest are joint, indivisible or inseparable and undivided. In the circumstances, I am of the considered opinion that there will be no inconsistent decrees if the suit proceeds and if it is decreed in favour of the petitioners even if the order of dismissal of suit as abated against Banubai Mohite remains on file. In the facts and circumstances of the present case and the well settled position in law, as referred to above, I am of

the view that the abatement of the suit in respect of deceased-plaintiff no.5 would not abate the suit qua other plaintiffs. I hold that the suit qua other plaintiffs is maintainable.

12. In the circumstances, this writ petition is allowed. The order impugned is quashed and set aside. The suit stands restored to file. The trial Court shall proceed with the suit and decide the same as expeditiously as possible and preferably within a period of one year from the date of receipt of this judgment. The interim order, which I am informed by the learned counsel for the parties is running all throughout, shall remain operative till disposal of the suit.

(D.B.Bhosale, J.)